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No. 500

IN THE

Supreme Court of the United States

October Term, 1940

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACOB L. SHERWOOD.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respondent, Jacob L. Sherwood, in opposition to the instant petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the judgment of the United States Circuit Court of Appeals entered herein on July 12, 1940, prays that said petition be denied.

Statement.

Respondent in this brief will make no attempt to set forth the arguments which are so fully and ably presented in the opinion of the Court below (R. 33-42), reported in 112 F. (2d) 587, to which we respectfully refer the Court. Accordingly, the argument herein will be confined to a brief answer to the specifications of error set forth in the Government's petition at page 5 thereof, upon which its contentions are based.

In Answer to Specification of Errors to be Urged.

A. Specifications 1 to 4.

The first four specifications of error in effect deal with the construction of Rule 17(b) of the Rules of Civil Procedure as controlling in Tucker Act cases. This rule, which states that "the capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile, is determinative of respondent's capacity to sue in the instant action, acting as he did by virtue of an order of the New York State Supreme Court, which permitted him to sue as a judgment creditor the United States of America, and its judgment debtor, Frederick M. Kaiser.

The petitioner in the Court below urged that the Federal rules are inapplicable to Tucker Act cases. After a thorough consideration of the purposes of the rules, and of the all-inclusive context to be found in the rules themselves, the Government's contentions were rejected by the Court for the following reasons (R. 35-37):

1—Rule 81 expressly provides for exceptions to the cases to be governed by the Federal Rules of Civil Procedure, and actions brought under the Tucker Act are not so excepted.

2—There is a manifest intent from a reading of the rules that they are intended to apply to all civil actions, including actions against the United States, and provision is specifically made for the United States as a party in such actions.

3—The Tucker Act itself, 28 U. S. C. A., Section 761, directs a uniformity in procedure when actions might be brought thereunder against the United States in the District Courts. Such actions against the United States would necessarily be included under the rules there applicable, except where the Tucker Act expressly provides otherwise.

4—The doctrine of *Waite* v. *United States,* 57 Ct. Cl. 546, is procedural and has no effect on the jurisdiction of District Courts.

The petitioner stops short of argument that the Federal Rules of Civil Procedure would not apply to Tucker Act cases with respect to such ordinary pre-trial procedure in the District Courts, such as amendments, depositions, subpoenas, and the like, for, as the Court below has pointed out (R. 36), we might well ask what rules of procedure would be followed if the present rules were held inapplicable. It would seem contrary to their intent to hold that in the matter of respondent's capacity to sue, the rules should be held to be inoperative, whereas in other respects their application is unquestioned.

The authority cited by petitioner in support of its contention is the case of *Lynn* v. *United States,* 110 F. (2d) 586. The Court in that case based its view that the rules had no applicability to Tucker Act cases, upon certain provisions in the Act, 28 U. S. C. A., Section 761. Not only did the Court indulge in no analysis of the new Federal rules, but, as found by the Court below, the statute itself furnishes compelling refutation.

B. Specification 5.

The fifth specification of error urged is that the joinder of respondent's judgment debtor as a co-defendant with the United States did not deprive the District Court of jurisdiction. Here, again, the petitioner raises the cry that the Federal rules are to have no meaning with respect to Tucker Act procedure, and that the present action is to be governed by Court of Claims rulings. The order of the Supreme Court of the State of New York would thereby be entirely nullified. No controversy remains as between the judgment creditor and judgment debtor as asserted by petitioner at page 11.

The provision for the joinder of the judgment debtor as a party defendant in such an action is clearly for the protection of said judgment debtor in the presentation of his claim. The sole purpose of this provision would

seem not to further any dispute between the judgment creditor and the judgment debtor, but simply to assure the judgment debtor of complete justice with relation to its claim. The necessity for this would be apparent if the judgment creditor for some reason did not sue for the full amount, or incorrectly stated the facts which might affect the judgment debtor's ability to recover any excess over the amount owed the judgment creditor. In any event, a single claim would be the subject of the action and the adjudication would be solely with respect to that claim. The Court below found no reason why the judgment debtor could not be a co-defendant without destroying jurisdiction.

C. Specification 6.

Petitioner urges substantively that the Court erred in holding that respondent could maintain the present action under Section 795 of the New York Civil Practice Act, in that such action constituted a violation of Revised Statutes, Section 3477, 31 U. S. C. 203.

To make this contention with success, it is submitted that two considerations must be surmounted. First, it must be shown that there was a transfer or assignment such as Revised Statutes, Section 3477, contemplated, and, secondly, that if such a transfer were made, it would not be a transfer by operation of law. The Court below held that the respondent herein, suing by virtue of Section 795 of the New York Civil Practice Act, did not sue as an assignee within the purview of Revised Statutes, Section 3477, but, on the contrary, the New York act merely confers upon the judgment creditor the power to bring such an action. The statute recites no such assignment, nor does it seem necessary to carry out its purpose.

Even if Section 795 should be construed to work an actual assignment, nevertheless this assignment, having been made by virtue of the order of the Supreme Court of the State of New York, was an assignment by operation of law. Certainly, it cannot be considered a volun-

tary assignment which alone is within the statutory prohibition, as enunciated by the Court in *Western Pacific R.R. Co.* v. *United States,* 268 U. S. 271.

The disposition of a claim against the United States by order of a State Court has in fact been held to be an assignment by operation of law.

Price v. *Forrest,* 173 U. S. 410.

Furthermore, there is no basis for petitioner's claim that in all assignments of claims against the United States, the assignee must be a general assignee, thus creating no change in the claimant's legal status as against the Government. This argument is clearly fallacious in that there are many instances of single claims sold by order of a Referee in Bankruptcy to a third party who clearly would not be in the same position as the original claimant, for the transferee of such a claim would not be subject to any counterclaims, or any other offsets which the Government might otherwise maintain.

In re Pottasch Bros. Co., 79 F. (2d) 613.
In re U. S. Fidelity & Guaranty Company, 267 Fed. 533.
In re Gerstenzang, 5 F. Supp. 904.

The eighth specification of error urged is not essential to this appeal, and consequently will not be discussed, and the ninth specification is simply the general specification for reversal.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

M. Carl Levine, Morgulas & Foreman,
Attorneys for Respondent,
By David Morgulas.

APPENDIX.

Section 761 of the Tucker Act, 28 U. S. C., Section 761, 24 Stat. 560, provides:

PROCEEDINGS IN SUITS AGAINST UNITED STATES.

The course of procedure for the District Courts and the Court of Claims in cases under Section 41, paragraph 20, and Section 250 of this title, insofar as applicable and not inconsistent with Sections 762 to 765, and the procedure prescribed for the Court of Claims shall be in accordance with the established rules of said respective Courts, and of such addition and modifications thereof as said Courts may adopt.

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